Supreme Court, U.S.
FILED

09-950 FEB 9 - 2010

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARCI J. BITTNER,

Petitioner

v.

SNYDER COUNTY, PENNSYLVANIA, and MICHAEL SHOLLEY, District Attorney of Snyder County,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is the Constitutional guarantee of due process violated when a District Attorney prosecuting a criminal case causes a bench warrant to issue for a witness, and instead of following the statutory procedural mandate that the arrestee be held in the County jail until a judicial hearing on the bench warrant may be timely had, the District Attorney rather directs the arresting police officer to deliver the handcuffed arrestee to his office for ex parte verbal abuse and physical intimidation, including threatening her family?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is not published, but is reported at *Bittner v. Snyder County*, 2009 WL 3022133 (C.A. 3 (Pa.)) 2009. The Third Circuit Court of Appeals affirmed the January 26, 2009 decision of the United States District Court for the Middle District of Pennsylvania, which is also not published, but which is reported at 2009 WL 179776 (M.D. Pa.) 2009.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Third Circuit's opinion was rendered on September 23, 2009. Petitioner herein filed a timely Petition for Rehearing en Banc or, in the Alternative, for Panel Rehearing, which the Third Circuit Court of Appeals denied on November 12, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 14th Amendment, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, Section 1983

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 150(A), Pennsylvania Rules of Criminal Procedure

Rule 150. Bench Warrants

(A) In a court case when a bench warrant is executed, the case is to proceed in accordance with the following procedures.

(1) When a defendant or witness is arrested pursuant to a bench warrant, he or she shall be taken without unnecessary delay for a hearing on the bench warrant. The hearing shall be conducted by the judicial officer who issued the bench warrant, or, another judicial officer designated by the president judge or by the president judge's designee to conduct bench warrant hearings.

. . . .

(5) The bench warrant hearing shall be conducted without unnecessary delay after the individual is lodged in the jail of the county of issuance on that bench warrant.

. . . .

(B) As used in this rule, "judicial officer" is limited to the magisterial district judge or common pleas court judge who issued the bench warrant, or the magisterial district

judge or common pleas court judge designated by the president judge or by the president judge's designee to conduct bench warrant hearings, or in Philadelphia, trial commissioners.

STATEMENT OF THE CASE

1. Petitioner Marci J. Bittner ("Bittner") seeks review of the Third Circuit Court of Appeals judgment, which affirmed the judgment of the United States District Court for the Middle District of Pennsylvania. The District Court had jurisdiction of this matter, in the first instance, pursuant to 8 U.S.C. §§ 1331 and 1367.

2. Bittner claims that the District Attorney of Snyder County, Pennsylvania, violated her federal constitutional rights by causing a bench warrant to issue and then directing that the arresting police officer bring her directly to his office rather than to the county jail pending a judicial hearing on the contempt charge, as required by Rule 150 of the Pennsylvania Rules of Criminal Procedure and the federal guarantee of Due Process (contained in the 4th Amendment, and made applicable to the States by the 14th Amendment).[1]

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[1] Bittner's Complaint in the District Court also alleged that the District Attorney had no probable cause to apply for a bench warrant for her arrest. However, the District Court broadly applied 11th Amendment immunity to all of the District Attorney's actions, and assumed that the District Attorney's request for the bench warrant fell within his prosecutorial role.

3. Bittner is a mother of three young children and resides in York County, Pennsylvania. She was served with a subpoena to testify at the criminal trial of her ex-husband to occur in Snyder County from May 29 through June 1, 2007. Bittner repeatedly informed the Office of the District Attorney that she was physically disabled from driving (she has a seizure disorder and is not licensed to drive) and otherwise had no transportation to the trial, which was eighty-seven miles from her home. The Office assured Bittner that the District Attorney was aware of her travel needs, and that arrangements would be made for her to attend the trial.

On May 29, 2007, a bench warrant was applied for by the Office of the District Attorney and granted by the Honorable President Judge Harold F. Woelfel Jr. of the Court of Common Pleas of Snyder County.[2]

Petitioner disputed this point before the District Court. The Third Circuit held that the District Court's rulings based on 11th Amendment immunity were error, as Plaintiff's Complaint named the District Attorney in his official, rather than his individual, capacity and thus imparted municipal liability on Snyder County. However, the Third Circuit Court of Appeals failed to consider whether the District Attorney's application for the bench warrant was supported by probable cause. Petitioner expects that, on remand, the District Court will decide this issue in the first instance.

[2] Snyder and Union Counties in Pennsylvania constitute the Commonwealth's 17th Judicial District. There are only two Judges, including President Judge Woelfel, for both Counties. In the 2009 Municipal Election held in Snyder and Union Counties, former District Attorney Michael Sholley, the District Attorney whose conduct is at issue here, was elected to replace the retiring judge. Judge Sholley and President Judge Woelfel

The following day, a Middleburg Borough Police Officer arrested Bittner at her York County residence, handcuffed her, and transported her to Snyder County, from whence the bench warrant had issued. Rather than being held in the County jail until a judicial hearing could be had on the bench warrant, Bittner was taken directly to the personal audience of the District Attorney who, without judicial supervision, questioned and harassed Bittner to his satisfaction.

During the interrogation, Bittner reminded the District Attorney that his staff had assured her transportation as well as supervision for her young children during her attendance at trial. While Bittner was held in his office, the District Attorney presented an application to vacate the bench warrant, which was granted by the President Judge at 2:10 p.m. on May 30. In his application, the District Attorney made no mention that Bittner had been arrested in York County by a Snyder County police offer, had been transported to his office and was then and there present, or that Bittner's failure to appear at the trial had not been willful. Rather, the District Attorney merely stated that the "Commonwealth has made contact with Marcy[sic] Bittner since the warrant was issued," and that "Marcy[sic] Bittner has assured the Commonwealth that she would appear in the future."[3]

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are now the sole members of the Bench in Snyder and Union Counties.

[3] See note 1, *supra*. The Court of Common Pleas of Luzerne County in Pennsylvania has been under judicial investigation following revelation in the summer of 2009, *inter alia*, of a

There is no indication that, at the time the bench warrant was vacated, the Court of Common Pleas was aware that Bittner had been arrested and transported to Snyder County, was then and there held captive in the District Attorney's office with police presence at the direction of the District Attorney, and that she had been denied due process and the judicial hearing mandated by Rule 150.

Bittner was then taken from the District Attorney's Office, and transported by police to a house of a relative in Perry County, nearly seventy miles from her home. Bittner was left there, and had no immediate means to return home.

4. Most states have statutes that require a prompt appearance of an arrested person before a judicial officer. *Coleman v. Frantz*, 754 F.2d 719, 721 n.1 (7th Cir. 1985), *citing* A.L.I., MODEL CODE OF PRE-ARRAGNMENT PROCEDURE 577-79, App. I (1975). Pennsylvania is within the majority of states

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kickback scandal, whereby two of the County judges received kickbacks from a juvenile detention facility for juveniles they sentenced there. To further their scheme, it is alleged that the judges deprived juvenile defendants of the right to an attorney, and failed to fully inform them of the charges they faced. Prosecuting attorneys and attorneys defending juveniles before the judges have faced heavy criticism for what some consider an unseemly relationship between attorneys and the judicial branch that detrimentally affects the rights of parties appearing before the Luzerne County Court of Common Pleas. *See generally*, "Red Flags Seen Early, Panel Told," Timesleader.com, http://www.timesleader.com/news/hottopics/judges/Red_flags_seen_early__panel_told_01-22-2010.html. The two judges have also been accused of case fixing. *See* "It Puts Pall Over All of Us," Pa. Law Weekly, Vol 32, No. 15 (April 13, 2009).

and has duly promulgated Rule 150 of the Pennsylvania Rules of Criminal Procedure, set forth above. In sum, it requires that an arrested person be taken "without unnecessary delay" to a hearing on the bench warrant, which "shall be conducted by" a judicial officer. The Rule contemplates that the hearing officer will be the judge who issued the bench warrant, a magisterial district judge, or an appropriate judicial designee. Pa.R.Crim.P. 150.

The Rule presumes that, until the hearing, the detainee will be housed in the county jail. The terms on the face of the bench warrant issued in Bittner's case complied with the requirements of Pa.R.Crim.P. 150. However, directly contrary to the established rule and the terms of the bench warrant on its face, the District Attorney directed the arresting officer to transport Bittner directly to his office.

5. Bittner filed her Complaint in the United States District Court for the Middle District of Pennsylvania on April 16, 2008. Bittner claimed that the municipality of Snyder County was liable for the violation of her federal rights that stemmed from the unconstitutional practices instituted by the District Attorney, a chief policy-maker for the County, as a matter of municipal custom or policy. On June 12, 2008, Respondents filed their Motion to Dismiss under the Federal Rules of Civil Procedure, Rule 12(b). The record is scanty, as one would expect when a case is decided on the pleadings. The District Court entered an Order and Memorandum on January 26, 2009, granting Respondents' Motion and dismissing the Complaint in its entirety.

Bittner filed her Notice of Appeal on February 9, 2009. The Third Circuit's decision was entered on September 23, 2009. Bittner timely filed her Petition for Rehearing en Banc or, in the Alternative, for Panel Rehearing on October 8, 2009, which was denied on November 12, 2009.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Third Circuit Court of Appeal's Opinion in this matter has decided an important question of federal law that conflicts with relevant decisions of this Court, and which have been properly applied by other Circuit Courts of Appeals: Is the federal Constitutional guarantee of due process violated when a bench warrant arrestee is denied judicial review of the bench warrant by the unilateral and egregious actions of the District Attorney, who questions her at will and with the assistance of police, and perfunctorily vacates the bench warrant upon misleading facts, thereby evading judicial review of his conduct?

The District Court held that Bittner's Complaint naming the District Attorney had been asserted against him "in the course of his role as advocate for the State ...," and was therefore precluded by 11th Amendment immunity. (Appendix, District Court Op. at pp. 13-15.) The Third Circuit appropriately corrected that error, finding that Bittner's claims alleged in her Complaint were lodged against the municipality rather than the District Attorney in his individual capacity, and therefore 11th

Amendment immunity did not apply. (Appendix, Third Circuit Court of Appeals' Op. at pp. 4-5.)

The District Court had also found that qualified immunity protected the District Attorney against Bittner's claims that he had unconstitutionally deprived her of liberty and the procedural due process requirement that she be provided a judicial determination of whether she was in contempt of court for willfully disobeying the subpoena for her ex-husband's criminal trial. Furthermore, the District Court determined that Bittner's constitutional rights were not violated "when, after arriving in Snyder County, [Bittner] was taken directly to [the District Attorney's] office at which time he interviewed [Bittner], was made aware of her transportation requests, and vacated the bench warrant." (District Court op. at 17-18, emphasis in original.)

The Third Circuit Court of Appeals, having held that the District Attorney's immunity was not attributed to the benefit of the municipality, nevertheless agreed with the District Court that no constitutional violation occurred because "the arrest warrant was vacated before a hearing could be conducted." (Opinion at 6.) Neither the District Court, nor the Third Circuit Court of Appeals, analyzed the District Attorney's post-arrest and pre-hearing interrogation as Due Process considerations require, and neither cited any authority for their errant conclusion.

In order to prove a cause of action under 42 U.S.C. § 1983, a plaintiff must produce evidence of (1)

misconduct that was committed by a person acting under color of state law; and (2) that as a result of such misconduct, the plaintiff was deprived of rights, privileges, or immunities secured by the Constitution or laws of the United States. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254-55, 101 L.Ed.2d 40 (1988). The first step in evaluating a section 1983 claim "is to identify the exact contours of the underlying right said to have been violated" and, of course, to determine whether the plaintiff has alleged a deprivation of a constitutional right at all. *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1870-71, 104 L.Ed.2d 443 (1989), *cited in County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S.Ct. 1708, 1714 n.5, 140 L.Ed.2d 1043 (1998); *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000) (en banc).

Here, both the District Court and the Third Circuit Court of Appeals agreed that Petitioner suffered no deprivation of a Constitutional right when she was arrested and, rather than receiving a judicial hearing on the bench warrant "without unnecessary delay," she was instead taken by the police officer directly to the Office of the District Attorney, where he interrogated her and otherwise verbally abused and threatened her. He then caused the bench warrant to be vacated on misrepresented facts, and had Petitioner abandoned nearly seventy miles from her home. But neither Court considered these alleged facts as pertinent to their conclusory holdings.

After the arrest but before the judicial hearing called for in Pa.R.Crim.P. 150, Bittner is properly classified as a pre-trial detainee. *Revere v.*

Massachusetts Gen. Hosp., 463 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983); *Armstrong v. Squadrito*, 152 F.3d 564, 569-70 (7th Cir. 1998) (an arrest pursuant to a bench warrant follows a judicial determination of sufficient cause, and the rights of such a pre-trial detainee receive the protection of due process); *Gary v. Modena*, 2006 WL 3741364 at *3 (11th Cir. 2006) (defendant was arrested for violation of probation and was therefore a pre-trial detainee); *Russell v. Lazar*, 300 F. Supp.2d 716, 720 (E.D.Wis. 2004) (defendant was arrested on a bench warrant and held on a detainer for an alleged probation violation).

Because Bittner's detention and forced interrogation at the District Attorney's Office occurred before the judge issuing the warrant even considered whether to sanction her for contempt, her claim for the post-arrest conduct is properly analyzed under the 14th Amendment. *County of Sacramento*, 523 U.S. at 845-46, 118 S.Ct. at 1716-17, *citing Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). The due process rights of pre-trial detainees were announced by the Supreme Court in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). In *Bell*, the Supreme Court held that conditions of pre-trial detention do not infringe upon a detainee's Fourteenth Amendment due process rights if those conditions do not amount to punishment of the detainee. *Bell* at 535, 99 S.Ct. at 1871. Restrictions on the liberty of pre-trial detainees do not constitute punishment if the restrictions are rationally related to a legitimate nonpunitive government objective. *Id.* at 539, 99 S.Ct. at 1874. See also *Union County Jail Inmates v.*

Di Buono, 713 F.2d 984, 992 (3d Cir. 1983), *cert. denied,* 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130 (1984) (applying the *Bell* test for conditions of pretrial detention).

Under the 14th Amendment's Due Process Clause, the question has also been asked as whether an executive abuse of power shocks the conscience:

> To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience. We first put the test this way in *Rochin v. California, supra,* at 172-73, 72 S.Ct. at 209-10, where we found the forced pumping of a suspect's stomach enough to offend due process as conduct "that shocks the conscience" and violates the "decencies of civilized conduct." In the intervening years we have repeatedly adhered to *Rochin*'s benchmark.

Armstrong, 152 F.3d at 570, *citing County of Sacramento*, 523 U.S. at 846-47, 118 S.Ct. at 1717.

The District Attorney's conduct in this case can only be viewed as punitive toward Bittner. There were adequate procedural means in place that, had they been followed as mandated, would have entailed a judicial determination of whether or not Bittner had, indeed, willfully disobeyed the subpoena to testify at the trial of her ex-husband. Indeed, the District Attorney's rogue conduct is shocking to the conscience.

With regard to procedural due process, the Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the 14th Amendment." *Vitek v. Jones*, 445 U.S. 480, 488, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552 (1980), and cases cited therein. Thus, where a state provides for a hearing "without necessarily delay" on a bench warrant, and the District Attorney arbitrarily abrogates that right by commandeering the arrestee's body for his own private interrogation, Due Process serves to protect that liberty interest. *See Roberson v. County of Essex*, 2006 WL 2844425 at *7 (D.N.J. 2006) (state court rule provided for a defendant's first appearance following the filing of a complaint "within 72 hours after arrest, excluding holidays, and shall be before a judge with authority to set bail for the offense charged"). The "non-discretionary" court rule in *Roberson*, just like Pennsylvania's Rule 150, "indicate the 'liberty interest in freedom from incarceration without speedy pretrial procedures.'" *Roberson*, 2006 WL 2844425 at *8.

Here, Bittner's liberty interests were denied without any procedure whatsoever. Due process was denied despite the significant liberty interest involved, the minimal cost of ensuring an appearance before a judge "without unnecessary delay," and the likelihood that such minimal procedure would have prevented the type of harm that fell upon Bittner here. *Id., citing Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). State action that "shocks the conscience" of the court, *Rochin* at 172, 72 S.Ct. at 209, or which is highly offensive to the

"concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), has led this Court to find a denial of due process. The abuse of power that the District Attorney here exercised—mishandling the person of a defendant arrested on a bench warrant while intentionally misleading the supervising judicial officer to prevent discovery of his unconstitutional and abhorrent conduct—is wholly inconsistent with notions of "fundamental fairness" that is required under the Due Process Clause. *See, e.g., California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984).

In *Collins v. Harker Heights*, 503 U.S. 115, 126, 112 S.Ct. 1061, 1069, 117 L.Ed.2d 261 (1992), the United States Supeme Court noted that the Due Process Clause was intended to prevent government officials "'from abusing [their] power, or employing it as an instrument of oppression,'" *quoting DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989). The District Attorney's conduct at issue in this case is clearly an abuse of his power, and warrants a proper analysis under the 14th Amendment's Due Process Class consistent with the decisions of this Court.

CONCLUSION

For all of the above reasons, Petitioner respectfully requests that the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully, submitted,

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CERTIFICATE OF SERVICE

I, Donald L. Reihart, Esquire, certify that a true and correct copy of the foregoing Appellant's Brief and Appendix, Volumes I and II, were caused to be served on the date shown below by depositing same in the United States mail, first-class, postage prepaid thereon, addressed as follows:

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1395

MARCI J. BITTNER,

Appellant

v.

SNYDER COUNTY, PENNSYLVANIA; MICHAEL SHOLLEY

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 4-08-cv-00707
District Judge: The Honorable John E. Jones, III

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
September 16, 2009

Before: SLOVITER, FUENTES, and SMITH, *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted on September 16, 2009.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered January 26, 2009, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against the appellant.

Attest:

/s/ Marcia M. Waldron
Clerk

Dated: September 23, 2009

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1395

MARCI J. BITTNER,

Appellant

v.

SNYDER COUNTY, PENNSYLVANIA; MICHAEL SHOLLEY

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 4-08-cv-00707
District Judge: The Honorable John E. Jones, III

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
September 16, 2009

Before: SLOVITER, FUENTES, and SMITH, *Circuit Judges*

(Filed: September 23, 2009)

OPINION

SMITH, *Circuit Judge*.

Marci J. Bittner appeals from the order of the United States District Court for the Middle District of Pennsylvania granting the motion to dismiss filed by Snyder County and Michael Sholley, the District Attorney of Snyder County.[1] For the reasons set forth below, we will affirm.

In April of 2007, Patrolman Chad Thomas of the Middleburg Borough Police Department hand-delivered a subpoena to Bittner, commanding her to appear and testify beginning May 29, 2007, at the criminal trial of her ex-husband. Thereafter, Bittner contacted District Attorney Sholley's office to advise him of her need for transportation and child care. District Attorney Sholley's office informed her that transportation and child care would be provided. Transportation was not provided, however, and

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[1] The District Court exercised jurisdiction under 28 U.S.C. §§ 1331, and 1343. 1 Appellate jurisdiction exists under 28 U.S.C. § 1291. We exercise plenary review over an order granting a motion to dismiss. In order to "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. __,129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 556 (2007)).

Bittner failed to appear as commanded by the subpoena. As a result, a bench warrant was issued for Bittner's arrest on May 29, 2007.

The following day, Patrolman Thomas arrested Bittner at her residence pursuant to the bench warrant, placed her in handcuffs, and transported her to the Snyder County Courthouse. After Bittner informed District Attorney Sholley that his staff had advised her that transportation would be provided, a petition was filed with the Prothonotary to withdraw the bench warrant. Within minutes, the Court of Common Pleas issued an order vacating the bench warrant. Bittner was transported to a relative's home twenty miles away, rather than being returned to her own home, which was eighty-seven miles from the courthouse.

Thereafter, Bittner filed a complaint in the United States District Court for the Middle District of Pennsylvania against Snyder County and District Attorney Sholley in his official capacity. She alleged that Snyder County, acting through District Attorney Sholley, violated her Fourth, Fifth, and Fourteenth Amendment rights. She claimed that she had been deprived of the compensation a witness is entitled to under Pennsylvania law and that District Attorney Sholley breached his promise to provide her with transportation and child care in violation of her rights under the Fourth, Fifth and Fourteenth Amendments. Her Fourth Amendment rights were violated, according to Bittner, when she was arrested without probable cause and excessive force was used in handcuffing her. She also averred that the failure to provide her with a hearing both before the bench warrant was issued and following her arrest constituted a violation of her right to due

process. In addition, she averred that District Attorney Sholley's failure to provide her with transportation and child care, as promised, constituted a violation of a special duty that was breached when she was not returned to her own home. Snyder County and District Attorney Sholley filed a 12(b)(6) motion to dismiss.

The District Court granted the motion to dismiss. It noted that Bittner had represented that her Complaint did not assert any state law claims, that she had not sued District Attorney Sholley in his individual capacity, and that she was asserting claims against him in only his official capacity. Nonetheless, the District Court analyzed Bittner's claims as if she had sued District Attorney Sholley in his individual capacity. Bittner's claims based on the events that occurred pre-arrest failed as a matter of law, according to the District Court, because Bittner had not alleged a constitutional violation. The claims arising from Bittner's arrest were dismissed because of District Attorney Sholley's absolute prosecutorial immunity. The District Court dismissed Bittner's claims based on the post-arrest conduct on the ground that District Attorney Sholley had qualified immunity.

The claims against the County alleged liability on the basis that the County, acting through District Attorney Sholley, either established and followed a policy or custom that deprived Bittner of her constitutional rights, or it failed to train and supervise its employees, thereby resulting in a violation of her constitutional rights. The Court explained that because the claims against Sholley could not be maintained, the claims against the County were also deficient.

Bittner filed a timely appeal. She reiterates that Sholley was sued solely in his official capacity as a policy maker for Snyder County and that the District Court erred by failing to properly evaluate her municipal liability claim. According to Bittner, the District Court "implicitly decided . . . that the District Attorney was acting as an agent for the Commonwealth, pursuing his prosecutorial functions, and was therefore immune under the Eleventh Amendment."

We appreciate Bittner's argument. It does appear that the District Court failed to independently analyze her municipal liability claims. *See Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3d Cir. 2004). The Supreme Court has explained that municipal liability under § 1983 may attach even though the individual may be protected by an immunity. *Owen v. City of Independence*, 445 U.S. 622, 638 (1980); *Collins v. City of Harker Heights*, 503 U.S. 115, 122 (1992). In this case, the claim against District Attorney Sholley in his official capacity is a claim against the municipal entity. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). It is well settled that before a municipality may be found liable under § 1983, there must be a constitutional violation. *See Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). The problem is that Bittner's complaint fails to allege that she was deprived of her constitutional rights.[2]

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[2] We decline to address Bittner's contention that the District Court implicitly decided that her claims were barred by the Eleventh Amendment inasmuch as the District Court does not mention it. We may affirm, however, on any basis supported by the record. *Nicini v. Morra*, 212 F.3d 798, 805 (3d Cir. 2000) (en banc); *see also Helvering v. Gowran*, 302 U.S. 238, 245 (1937) ("In the review of judicial proceedings the rule

We agree with the District Court that Bittner's pre-arrest claims fail to allege a constitutional violation. Because Bittner was present in the courthouse pursuant to a bench warrant, and not in response to the subpoena, she had no right to receive witness compensation and mileage under Pennsylvania's statutory law. Accordingly, there is no ground for a due process claim based on a deprivation of property. Nor is there any constitutional right to transportation and the child care she was allegedly promised by the District Attorney's office.

The claims arising from Bittner's arrest also fail. "The simple fact of nonappearance provided the government with probable cause to apply for a bench warrant[.]" *In re Grand Jury Proceedings*, 658 F.2d 211, 214 (3d Cir. 1981); *see also Luckes v. County of Hennepin, Minnesota*, 415 F.3d 936, 939 (8th Cir. 2005).[3]

Bittner also claims that she was deprived of her due process rights because she was not afforded a hearing prior to the issuance of the bench warrant or following her arrest. Neither this court nor the

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is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.").

[3] In addition to alleging a violation of her Fourth Amendment right not to be arrested without probable cause, Bittner also alleged that she was subjected to excessive force in being handcuffed. On appeal, Bittner submits, not that excessive force was used, but that her rights were violated because she was handcuffed even though she was not a criminal defendant. Viewed in this light, her claim is simply another way of alleging that she was arrested without probable cause. That claim, however, fails as a matter of law since Patrolman Thomas properly arrested Bittner under the bench warrant.

Supreme Court has held that there is a right to be heard before the issuance of a warrant. With respect to her claim that she was deprived of her right to a hearing post-arrest, we fail to see a violation of that right inasmuch as the arrest warrant was vacated before a hearing could be conducted.

Finally, we agree with the District Court that Bittner's state created danger claim, which presumes there was a special duty to provide her with transportation to her home once she was arrested, fails as a matter of law. Her averments, even accepted as true, do not plausibly suggest the elements of a viable state created danger claim. *See Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir. 2006). Accordingly, that claim does not survive the County's 12(b)(6) motion. *Iqbal*, 129 S.Ct. at 1949.

In sum, we will affirm the judgment of the District Court. A necessary predicate for a § 1983 municipal liability claim is a constitutional violation. The complaint, however, did not provide sufficient factual matter to establish a reasonable inference that Bittner's constitutional rights had been violated. Accordingly, her complaint was properly dismissed. *Id.*

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARCI J. BITTNER	:	No. 08-cv-707
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
SNYDER COUNTY, PENNSYLVANIA, and MICHAEL SHOLLEY,	:	Judge John E. Jones III
	:	
Defendants	:	

MEMORANDUM

January 26, 2009

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS

Pending before this Court is a Motion to Dismiss the Plaintiff's Complaint (the "Motion") filed by Defendants Snyder County, Pennsylvania ("Snyder County") and District Attorney of Snyder County, Michael Sholley ("Sholley") (collectively, "Defendants") on June 12, 2008. (Rec. Doc. 9). For the reasons that follow, the Motion will be granted.

PROCEDURAL HISTORY:

Plaintiff Marci J. Bittner ("Plaintiff" or "Bittner") commenced the instant action by lodging a civil rights Complaint against Defendants on April 16, 2008. (Rec. Doc. 1). On June 12, 2008, the

Defendants filed the instant Motion and a brief in support thereof, requesting dismissal of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] (Rec. Docs. 9, 11). The Plaintiff submitted her brief in opposition to the Motion on June 28, 2008, (Rec. Doc. 13), and the Defendant responded with a reply brief on July 10, 2008, (Rec. Doc. 17). Since the Motion has been fully briefed, it is now ripe for disposition.

STANDARD OF REVIEW:

When considering a motion to dismiss under Rule 12(b)(1), a court must distinguish between facial and factual challenges to its subject matter jurisdiction. See Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). A facial attack challenges whether the plaintiff has properly pled jurisdiction. Id. "In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000) (citing Mortensen, 549 F.2d at 891). A factual attack, in contrast, challenges jurisdiction based on facts apart from the pleadings. Mortensen, 549 F.2d at 891. "When a defendant attacks subject matter jurisdiction 'in fact,' . . . the Court is free to weigh the evidence and satisfy itself whether it has power to hear the case. In such a situation, 'no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from

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[1] Rule 12(b)(6) permits dismissal of a complaint that fails to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12.

evaluating for itself the merits of jurisdictional claims.'" Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 69 (3d Cir. 2000) (quoting Mortensen, 549 F.2d at 891).

In considering a motion to dismiss pursuant to Rule 12(b)(6), courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008) (quoting Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)).

A Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirements of Rule 8(a). Rule 8(a)(2) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, --- U.S. ----, 127 S. Ct. 1955, 1964 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 1965. A plaintiff must make "a 'showing' rather than a blanket assertion of an entitlement to relief", and "without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provided not only 'fair notice,' but also the 'grounds' on which the claim rests." Phillips, 515 F.3d at 232 (citing Twombly, 127 S. Ct. at 1965 n. 3).

"[A] complaint must allege facts suggestive of [the proscribed] conduct, and the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Twombly, 127 S. Ct. at 1965, 1969 n.8. Therefore, "stating a claim requires a complaint with enough factual matter (taken as true) to suggest the required element." Phillips, 515 F.3d at 234 (quoting Twombly, 127 S. Ct. at 1965 n. 3).

On the other hand, "a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." Id. at 231 (citing Twombly, 127 S. Ct. 1964-65, 1969 n.8). Rule 8 "does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." Id. at 234.

STATEMENT OF MATERIAL FACTS:[2]

On March 9, 2006 a criminal complaint was filed by the District Attorney of Snyder County, Michael Sholley, against Plaintiff's ex-husband alleging that he committed crimes upon the person of Plaintiff's now-18-year-old son. (Compl. ¶¶ 7, 9). In June of 2006, Plaintiff was contacted by Sholley's office and informed that her testimony would be needed at the trial of her ex-husband. (Id. ¶ 10). At that time, she informed someone in the District Attorney's Office that she required transportation to Snyder County since she had no license and could not drive due to a medical condition. (Id. ¶ 11). Sholley requested a subpoena to Attend and Testify

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[2] Since the resolution of the instant Motion requires us to accept as true all of the allegations in the Complaint, the following recitation of facts is taken therefrom.

for Plaintiff, which was issued by Snyder County officials on April 24, 2007. (Id. ¶ 13). Upon receiving service of the subpoena, effectuated by Patrolman Chad Thomas ("Thomas") of the Middleburg Police Department, Plaintiff informed Thomas that she required both transportation to the Snyder County Courthouse and custodial care/supervision for her two additional children, ages 6 and 7 at the time. (Id. ¶¶ 8, 15).

The trial of Plaintiff's ex-husband was scheduled for May 29-31, 2007. (Id. ¶ 12). Around May 21, 2007, Plaintiff phoned the District Attorney's Office ("D.A.'s Office") to remind them that she needed transportation from her residence in Spring Grove, Pennsylvania to Snyder County, a distance spanning approximately 175 miles round trip, and that she needed custodial care for her two younger children. (Id. ¶¶ 17, 20). At that time, Plaintiff was assured by someone in the D.A.'s Office that transportation would be provided to her and care would be provided to her children. (Id. ¶¶ 19, 21). After her communication with the D.A.'s Office, Plaintiff was under the assumption that transportation and custodial care for her children were conditions of the subpoena and were being provided in exchange for her testimony. (See id. ¶ 24).

Transportation was never provided to Plaintiff on the day she was supposed to testify and thus, Plaintiff failed to appear at the Snyder County Courthouse. (See id. ¶ 34). In response to Plaintiff's failure to appear in court, Sholley applied for a bench warrant to arrest Plaintiff, which was granted on May 29, 2007. (Id. ¶¶ 24, 25). On May 30, 2007, Plaintiff was arrested at her home by Patrolman

Thomas, who was allegedly acting as an agent of the D.A.'s Office. (Id. ¶ 26). Thomas handcuffed Plaintiff pursuant to police "procedures," even though she avers that she posed no threat to him, placed her in the back of a police cruiser, and transported her 87 miles to the Snyder County Courthouse. (Id. ¶ 29). On that day, Plaintiff avers that it was 87 degrees Farenheit, yet Thomas never rolled down the back windows of the cruiser, even though the glass partition between the front and back seats prevented air conditioned air from reaching her. (Id. ¶ 29, 30).

Upon arrival at the courthouse, Plaintiff was unhandcuffed and interviewed by Sholley. (Id. ¶ 33, 34). It was at this time that Plaintiff informed Sholley that someone in his office told her that transportation to the courthouse would be provided to her. (Id. ¶ 34). Plaintiff further avered that her failure to appear resulted from his office not providing said transportation. (Id.). Soon after his conversation with Plaintiff, Sholley withdrew the bench warrant. (Id. ¶ 35). Plaintiff assured Sholley that she would appear for court proceedings in the future.[3] (Id. ¶ 36). Plaintiff was later informed that she would not be returned to her home in Spring Grove, but that she was going to be "dropped off" at a relative's house 20 miles from the Snyder County Courthouse, (id. ¶ 40), and 67 miles away from her home, (id. ¶¶ 41, 42). Plaintiff's husband was forced that drive that distance in order to take his wife home. (Id. ¶ 43).

These events precipitated the filing of the instant action, in which Plaintiff lodges claims

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[3] As it transpired, Plaintiff never actually had to testify against her ex-husband. (Compl. ¶ 44).

against both Snyder County and D.A. Sholley. The Complaint, inter alia, asserts that Snyder County, through the actions of Sholley, deprived Plaintiff of her Fourth, Fifth, and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983.[4] A fair reading of the Complaint leads us to the conclusion that Plaintiff also asserts the constitutional claims of invasion of privacy, defamation, and deprivation of Plaintiff's right to freedom of association. (See id. ¶ 69, 70). The Complaint also appears to contain various Pennsylvania state law claims. We will address these claims *seriatum*.

DISCUSSION:

Initially, we note that Plaintiff appears to have abandoned her state claims. Despite alleging violations of the Pennsylvania law in her Complaint, Plaintiff states in her opposition brief that "the Complaint does not allege state claims." (Rec. Doc. 13 p. 15). We consider this to constitute a voluntary dismissal of these claims.[5] We will therefore grant

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[4] 42 U.S.C. § 1983 states, in pertinent part "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." 42 U.S.C. § 1983.

[5] Indeed, we would dismiss these claims even if Plaintiff had not voluntarily done so. 42 U.S.C. § 1983 states, in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws*, shall be liable to the party injured . . . ." 42 U.S.C. § 1983 (emphasis added). Quite clearly, § 1983 only creates a cause of

the instant Motion to the extent the Complaint contains claims based in state law. Accordingly, our discussion will focus solely on the federal claims contained in the Complaint.

A. PLAINTIFF'S § 1983 CLAIMS AGAINST D.A. SHOLLEY[6]

Plaintiff avers that Sholley violated her federal constitutional rights, in violation of § 1983, through the following acts:

1. Failing to meet his special duty arising from the promises to provide Plaintiff with transportation to Snyder County and with child care (Compl. ¶ 51);
2. Denying Plaintiff transportation, compensation, travel mileage, lodging, and other matters incidental to the subpoena in violation of the Fourth, Fifth, and Fourteenth Amendments (Id. ¶¶ 50, 55, 61);
3. Arresting Plaintiff on a bench warrant without a written

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action for violations of *federal* law. Therefore, Plaintiff's § 1983 claims sounding in violations of Pennsylvania law are not cognizable and would have been dismissed regardless of Plaintiff's acquiescence in that regard.

[6] Plaintiff's brief in opposition to the instant Motion indicates that Sholley is not being sued in his individual capacity, only in his official capacity as "policymaker for Snyder County." (Br. Opp. p. 7). Therefore, we will grant the Motion to the extent that the Complaint can be read to lodge claims against Sholley in his individual capacity.

certification being presented to the court for said warrant in violation of the Fourth and Fourteenth Amendments (Id. ¶ 57);

4. Arresting Plaintiff because she was not provided transportation to the Snyder County Courthouse, in violation of the Fourteenth Amendment Due Process Clause (Id. ¶¶ 50, 51, 55, 61, 66);

5. Arresting Plaintiff without probable cause or a hearing and arresting her when she was not in contempt of a subpoena in violation of the Fourth Amendment (Id. ¶¶ 49, 52);

6. Defaming Plaintiff as a result of her unlawful arrest in violation of her privacy and due process rights protected by the First and Fourteenth Amendments (Id. ¶¶ 69, 70; Br. Opp. p. 6);

7. Depriving Plaintiff of her liberty without due process in violation of the Fourteenth Amendment (Id.);

8. Subjecting Plaintiff to an excessive use of force after arrest in violation of the Fourth and Fourteenth Amendments (Id. ¶¶ 53, 65, 67);

9. Denying Plaintiff freedom of association in violation of the First Amendment (Id. ¶ 70);

10. Vacating a bench warrant instead of providing Plaintiff a postarrest hearing, thereby denying Plaintiff access to the courts in violation of the Fourth and Fourteenth Amendment (Id. ¶¶ 58, 59);

11. Failing to return Plaintiff to her residence following her release from custody in violation of the Fourth and Fourteenth Amendments (Id. 60, 64; Br. Opp. p. 12);

12. Subjecting Plaintiff to a "state created danger," in violation of the Due Process Clause of the Fourteenth Amendment, in failing to return Plaintiff to her residence following her release from custody (Id. ¶ 60).

We shall address these averments sequentially.

1. PRE-ARREST CLAIMS

With regard to the allegations concerning conduct occurring prior to the arrest, Plaintiff bases her § 1983 claim on the failure to provide transportation, travel, mileage, lodging and other agreed upon amenities to her. Defendants assert that, while state procedures may afford witnesses compensation for travel or attendance at trial, these amenities are not protected by the federal constitution and therefore cannot support a § 1983 claim. However, this view is incorrect. The

Pennsylvania General Assembly has codified laws that compensate subpoenaed witnesses in state court proceedings for, inter alia, travel, mileage, and lodging in connection for testifying before a state governmental unit. 42 Pa.C.S. § 5903. The mandatory nature of the statute means that recompense for these items are the property of the subpoenaed witnesses. Hence, depriving a witness of this property without due process would conceivably violate the Fourteenth Amendment.[7] Nonetheless, Plaintiff admits that she never testified in her husband's trial and fails to aver that she was in attendance at the trial as a potential witness. Therefore, she has not alleged facts that would entitle her to witness compensation,[8] meaning that her failure to receive the alleged compensation does not violate any federal law. Accordingly, she cannot base her § 1983 claim on this ground. The instant Motion will be granted to this extent.

Furthermore, we must also dismiss from this § 1983 action Plaintiff's allegation that Sholley failed to honor a promise to provide the aforementioned witness amenities. As was aforestated, a violation of federal law is the *sine qua non* of a § 1983 action.

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[7] The Fourteenth Amendment states, in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV.

[8] We can find no provision entitling Plaintiff to witness compensation in connection with her transport to Snyder County pursuant to the arrest warrant, regardless of whether that warrant was validly issued.

There is no federal right to the receipt of the benefits bargained for in connection with a promise. Thus, this claim cannot support a § 1983 action and must be dismissed. The instant Motion will be granted to this extent as well.

2. CLAIMS MADE IN CONNECTION WITH THE ARREST

With regard to the claims emanating from the arrest itself, Plaintiff asserts that her federal rights were violated when Sholley secured a bench warrant for Plaintiff without a written certification being presented to the court for said warrant, when Plaintiff was arrested pursuant to that warrant after Snyder County had failed to provide her with transportation to the county courthouse, and when Plaintiff was arrested without probable cause.[9]

In response to these allegations, Defendants assert that Sholley possesses prosecutorial immunity in connection with these acts. Bittner denies that such immunity is available to Sholley under the circumstances. The Supreme Court of the United States has held that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as advocate for the State, are entitled to the protections of absolute immunity." Buckley v. Fitzsimmons, 509 U.S. 259, 260 (1993). In

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[9] We note that there is no federal right mandating a prosecutor to present written certification to the court in seeking a bench warrant. Thus, the Plaintiff cannot use such a contention, as aforestated, to support the instant § 1983 claim. In lieu of dismissing that averment outright, we will construe it to support Plaintiff's assertion that her arrest was effectuated without probable cause.

other words, prosecutors are afforded immunity for acts that are "intimately associated with the judicial phases of litigation, but not . . . administrative or investigatory actions unrelated to initiating and conducting judicial proceedings." Odd v. Malone, 538 F.3d 202, 208 (3d Cir. 2008) (internal citations and quotations omitted). Further, this immunity is not eviscerated because of an action that was in error or was done maliciously, wilfully, or in bad faith. Ernst v. Child & Youth Servs. of Chester County, 108 F.3d 486, 502 (3d Cir. 1997).

In the instant case, Sholley secured a bench warrant from the judge presiding over the trial of Bittner's ex-husband, and then contacted Patrolman Thomas to effectuate the arrest. We believe that the application for a bench warrant and the facilitation of arrest certainly falls within the "judicial phase" of litigation and would therefore qualify for absolute immunity.[10] Further, Plaintiff does not contend nor is there any evidence to support an inference that Sholley was acting in bad faith when he applied for the arrest warrant. From all accounts, it appears that Sholley honestly believed he had probable cause to arrest Plaintiff for failing to comply with the subpoena. Sholley's failure to ascertain that his office promised Bittner transportation to and from

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[10] Indeed, the Supreme Court has held that prosecutors maintain absolute immunity for their participation in probable cause hearings and for seeking the issuance of search warrants from courts. Burns v. Reed, 500 U.S. 478, 487 (1991); see also Betts v. Richard, 726 F.2d 79, 81 (2d Cir. 1984) (for proposition that securing a material witness warrant is within the prosecutorial capacity of a prosecutor). Certainly, Sholley's actions in applying for the arrest warrant and facilitating the arrest can be analogized to the actions referenced in Burns.

Snyder County at most rises to negligence, which would not eradicate Sholley's absolute immunity. Accordingly, since Sholley was acting in good faith within his prosecutorial capacities, he is entitled to absolute immunity in connection with the above-referenced allegations. The instant Motion will therefore be granted to this extent.

The remainder of the Plaintiff's claims regarding conduct attendant to the arrest revolve around the manner of the arrest or the consequences produced by the arrest.[11] Since Sholley did not physically make the arrest which occasioned the alleged injuries, in lodging these claims against D.A. Sholley the Plaintiff appears to hinge liability on the fact that Sholley was the person who sought the bench warrant that, when effectuated, resulted in the alleged constitutional violations. However, as we have already stated, Sholley sought the bench warrant pursuant to his prosecutorial duties and therefore is entitled to absolute prosecutorial immunity in connection with these claims. Therefore, the instant Motion will be granted to the extent that the Complaint asserts claims of defamation and invasion of privacy occasioned by the arrest, deprivation of liberty in connection with the harm to her reputation produced by the arrest, deprivation of her right to freedom of association, and the use of excessive force in effectuating the arrest.

3. POST-ARREST CLAIMS

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[11] More specifically, these claims involve: defamation and invasion of privacy occasioned by the arrest, deprivation of liberty in connection with the harm to her reputation produced by the arrest, deprivation of her right to freedom of association, and the use of excessive force in effectuating the arrest.

Plaintiff asserts that following her arrest, her constitutional rights were deprived by Sholley in the following ways: (I) he vacated a bench warrant instead of providing her with a post-arrest hearing, thereby denying her access to the courts in violation of the Fourth and Fourteenth Amendment; (II) he failed to return her to her residence following her release from custody in violation of the Fourth and Fourteenth Amendments; and (III) he subjected her to a "state created danger," in violation of the Due Process Clause of the Fourteenth Amendment, in failing to return her to her residence following her release from custody.

Defendants again assert that absolute immunity shields Sholley from liability in regards to these acts. As aforestated, absolute immunity is afforded to prosecutors only when they are engaged in the traditional roles of an advocate. Fitzsimmons, 509 U.S. at 260. When the prosecutor is engaged in administrative matters, he or she is only afforded qualified immunity. Id. We decline to determine whether Sholley's above-referenced acts were committed in a prosecutorial capacity or an administrative capacity because, at worst he would be afforded qualified immunity, which, as we delineate below, would shield him from the above-named claims.

Qualified immunity protects government officials performing discretionary functions so long as their conduct does not violate established constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Plaintiff must adduce specific allegations or evidence as to the allegedly violative conduct of Sholley in order to avoid the vesting of

qualified immunity. See Good v. Dauphin Soc. Servs., 891 F.2d 1087, 1092, 1096-97 (3d Cir. 1990). Essentially, we must determine whether there was a constitutional violation and whether there was good reason for Sholley to know his actions were unconstitutional. Wilkie v. Robbins, 127 S.Ct. 2588, 2617 (2007) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)); see also Pearson v. Callahan, ____ S.Ct. ____, 2009 WL 128768 (2009) (modifying Saucier to the extent that courts need not first determine whether facts alleged or shown by plaintiff make out violation of constitutional right).

With regard to the vacation of the bench warrant without providing a postarrest hearing, Defendants aptly observe that the absence of such a hearing does no violence to any federal rights, especially when, after arriving in Snyder County, Plaintiff was taken directly to Sholley's office at which time he interviewed Plaintiff, was made aware of her transportation requests, and vacated the bench warrant. (Compl. ¶¶ 32, 34, 36). Since there is no underlying federal violation in this instance for vacating a bench warrant in lieu of conducting a post-arrest hearing, D.A. Sholley's qualified immunity is not terminated in this regard. We will grant the instant Motion to this extent.

Further, arrestees have no federally recognized right to be returned to their place of arrest or to their place of residence. They do, however, have a right to avoid being subjected to a "state created danger." To sufficiently posit a state created danger claim, the Plaintiff must aver that: (I) "the harm ultimately caused to the plaintiff was forseeable and fairly direct;" (II) "the state-actor acted in willful disregard for the plaintiff's safety;"

(III) "there was some relationship between the state and the plaintiff;" and (IV) "the state-actor used his authority to create an opportunity for danger that otherwise would not have existed." Phillips v. County go Allegheny, 515 F.3d 224, 235 (3d Cir. 2008) (citing Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. 2006)). In the case sub judice, the Plaintiff has not alleged that she was harmed when she was returned to a relative's house, instead of her own residence, following her release from custody. Further, taking Plaintiff to a relative's house certainly would not, in an of itself, display "willful disregard" for her safety, and Plaintiff has alleged nothing more than that. Thus, Plaintiff cannot satisfy the state-created danger test. Accordingly, since Sholley did not violate any federal right in failing to return Plaintiff to her place of residence following her release from custody and since doing so did not subject her to a state created danger, Sholley's qualified immunity in these regards is not terminated. Therefore, we will grant the instant Motion with respect to these averments.

B. PLAINTIFF'S § 1983 CLAIMS AGAINST SNYDER COUNTY

A municipality is liable under § 1983 "when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflict the injury." Monell v. Dep't of Soc. Serv., 436 U.S. 658, 694 (1978). A municipality is not liable under § 1983 unless a "policy" is the moving force behind the constitutional violation. City of Canton v. Harris, 489 U.S. 378, 388 (1989). In order to be held liable under § 1983 for a failure to supervise its police officers, a plaintiff must establish

that such failure reflects a policy of "deliberate indifference"[12] to the constitutional rights of its citizens. Additionally, plaintiffs ". . . must identify a failure to provide training that has a causal nexus with their injuries and must demonstrate that the absence of that specific training can reasonably be said to reflect a deliberate indifference to whether the alleged constitutional deprivations occurred." Reitz v. County of Bucks, 125 F.2d 139, 144 (3d Cir. 1997) (citations omitted).

Plaintiff avers that Snyder County violated her constitutional rights by perpetrating the following acts:

1. Failing to establish and follow a policy, custom, or procedure, and failing to train or supervise with regard to providing witnesses subpoened to testify with transportation, compensation, travel mileage, lodging, and other matter incidental to the subpoena (Id. ¶¶ 55, 61);
2. Failing to establish and follow a policy, custom, or procedure, and

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[12] To establish deliberate indifference, plaintiffs must demonstrate: (1) That the municipal policymaker had contemporaneous knowledge of the offending occurrence or knowledge of a prior pattern of similar violations of constitutional rights; and (2) A failure to take adequate measures to ensure the particular right in question or otherwise communicated a message of approval to the offending subordinate.

Garcia v. County of Bucks, Pa., 155 F. Supp. 2d 259, 268 (E.D. Pa. 2001) (citing Montgomery v. DeSimone, 159 F.3d 120, 127 (3d Cir. 1998).

failing to train or supervise with regard to requiring that probable cause and intentional noncompliance be established before a bench warrant is requested (Id. ¶¶ 56, 62);

3. Failing to establish and follow a policy, custom, or procedure, and failing to train or supervise with regard to requiring a written motion with certification be presented to the court for a bench warrant (Id. ¶ 57);
4. Failing to establish and follow a policy, custom, or procedure, and failing to train or supervise with regard to requiring a postarrest hearing (Id. ¶ 58, 63);
5. Failing to establish and follow a policy, custom, or procedure, and failing to train or supervise with regard to vacating a bench warrant instead of providing a post-arrest hearing (Id. ¶ 59);
6. Failing to establish and follow a policy, custom, or procedure, and failing to train or supervise with regard to not returning arrested persons to the place of their arrest (Id. 60, 64; Br. Opp. p. 12);
7. Establishing and following a policy, custom of procedure of failing to adequately train or supervise those who had responsibility to make bench

warrant arrests regarding misconduct subsequent to arrest (Id. ¶ 65).

These claims must be dismissed for two reasons. First, we note that in order to hold a municipality liable under Monell, a plaintiff must first demonstrate that a Constitutional violation has occurred. Woloszyn v. County of Lawrence, 396 F.3d 314 (3d Cir. 2005); see also DeBellis v. Kulp, 166 F. Supp. 2d 255, 275 (E.D. Pa. 2001). Here, all of the bases for subjecting Snyder County to Monell liability have been lodged against D.A. Sholley in order to establish his liability under § 1983. As noted above, the Plaintiff cannot maintain any of her § 1983 claims against D.A. Sholley.[13] Therefore, these same bases are insufficient to establish a Monell action
against Snyder County.

Secondly, even if D.A. Sholley had been liable on Plaintiff's claims, she would not be able to hold Snyder County liable for those same acts because she has not sufficiently alleged a Monell claim. In her Complaint, Bittner merely asserts, in various places, that Snyder County maintained a policy, custom, or practice of engaging in acts that deprived her of her federal rights. She provides no further detail as to the alleged policies, customs, or practices. This falls well short of the federal pleading standard contemplated by Federal Rule of Civil

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[13] At most, Patrolman Thomas was acting as Sholley's direction, or as posited by Plaintiff, as his "agent." (Compl. ¶ 26).

Procedure 8(a).[14] Therefore, regardless of D.A. Sholley's § 1983 liability, Plaintiff's insufficient pleading would have resulted in the dismissal of the Monell claims against Snyder County.

CONCLUSION:

Based on the foregoing, the Plaintiff cannot maintain viable § 1983 claims against either D.A. Sholley or Snyder County. For that reason we will grant the instant Motion in its entirety. A appropriate Order will enter.

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[14] The Supreme Court of the Untied States has noted that the pleading standard contained in Federal Rule of Civil Procedure 8(a) requires "more than labels and conclusion, and [that] a formulaic recitation of the elements of a cause of action will not do." Twombly, 127 S.Ct. at 1964. With regard to pleading Monell claims, this Court has held that merely alleging that a municipality has "engaged in a policy, custom, and practice" that violated plaintiff's federal rights is precisely the formulaic recitation of legal elements that the Supreme Court determined was insufficient in defeating a motion to dismiss. Heilman v. T.W. Ponessa & Assocs., 2008 WL 275731 * 14 (M.D. Pa. 2008). While Plaintiff need not plead detailed facts regarding the alleged policy, custom, or practice, she must, in the very least, plead facts that: (I) put Defendants on notice with regard to the basis for the alleged policy, custom, or practice; and (II) "show" that she is entitled to relief as a result of that policy, custom, or practice. See Twombly, 127 S.Ct. at 1964. Plaintiff's mechanical recitation of the elements of a Monell claim fall well below this standard.

Supreme Court, U.S.
FILED
MAR 17 2010
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No. 09-950

In The Supreme Court of the United States

MARCI J. BITTNER,

Petitioner,

v.

SNYDER COUNTY, PENNSYLVANIA, and MICHAEL SHOLLEY, District Attorney of Snyder County,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Due Process Pursuant To The Fourteenth Amendment Is Violated When A District Attorney Prosecuting A Criminal Case Requests That The Court Vacate An Executed Bench Warrant Issued For A Witness, Who Failed To Appear Pursuant To A Subpoena, And The Witness Is Released On The Same Date As The Arrest Without A Judicial Hearing On The Bench Warrant.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

The United States Court of Appeals for the Third Circuit rendered its decision on September 23, 2009. Bittner filed her Petition for Rehearing en Banc or, in the alternative, for Panel Rehearing on October 8, 2009, which was a day late under Federal Rule of Appellate Procedure 40. The United States Court of Appeals for the Third Circuit denied the Petition for Rehearing en Banc on November 12, 2009. Bittner timely filed her Petition for Writ of Certiorari on February 9, 2010.

STATEMENT OF THE CASE

Petitioner Marci J. Bittner seeks review of a decision of the United States Court of Appeals for the Third Circuit arising out of her 42 U.S.C. §1983 claim against Snyder County, Pennsylvania and Michael Sholley, District Attorney of Snyder County, Pennsylvania, in his official capacity. Bittner's claim arises out of her May 30, 2007 arrest on a bench warrant issued by the Court of Common Pleas of Snyder County and her subsequent release from custody via vacation of the bench warrant by the Court. A judicial hearing was not conducted on the bench warrant under Pennsylvania Rule of Criminal Procedure

150,[1] prior to the vacation of the warrant on motion of the District Attorney.

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[1] Pennsylvania Rule of Civil Procedure provides, in relevant part, that:

Rule 150. Bench Warrants

(A) In a court case when a bench warrant is executed, the case is to proceed in accordance with the following procedures.

(1) When a defendant or witness is arrested pursuant to a bench warrant, he or she shall be taken without unnecessary delay for a hearing on the bench warrant. The hearing shall be conducted by the judicial officer who issued the bench warrant, or, another judicial officer designated by the president judge or any the president judge's designee to conduct bench warrant hearings.

. . .

(3) When the individual is arrested in the county of issuance, if the bench warrant hearing cannot be conducted promptly after the arrest, the defendant or witness shall be lodged in the county jail pending the hearing. The authority in charge of the county jail promptly shall notify the court that the individual is being held pursuant to the bench warrant.

. . .

(5) The bench warrant hearing shall be conducted without unnecessary delay after the individual is lodged in the jail of the county of issuance on that bench warrant.

(a) When the bench warrant is issued by the supervising judge of a "multi-county"

(Continued on following page)

Bittner's claim stems from her failure to appear at the criminal trial of her ex-husband. On or about June of 2006, she was allegedly contacted by the Snyder County District Attorney's Office and was notified that her testimony would be needed at the trial of her ex-husband. Bittner claims to have informed the District Attorney's Office that she would need transportation to Snyder County and certain child care services while she testified.

Bittner claims that the District Attorney of Snyder County requested a subpoena to attend and testify from the Prothonotary or Clerk of Courts of Snyder County and subsequently served the subpoena on Bittner on May 21, 2007 via personal service by Patrolman Chad Thomas of the Middleburg

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investigating grand jury, the individual shall be detained only until the supervising judge is available to conduct the bench warrant hearing.

(b) In all other cases, the individual shall not be detained without a bench warrant hearing on that bench warrant longer than 72 hours, or the close of the next business day if the 72 hours expires on a non-business day.

(6) At the conclusion of the bench warrant hearing following the disposition of the matter, the judicial officer immediately shall vacate the bench warrant.

. . .

Borough Police Department. Bittner alleges that she again informed the District Attorney's Office that she needed transportation from her home to the courthouse and needed child care services. Bittner alleges that a staff member at the District Attorney's Office informed her that transportation would be provided as would child care services.

Bittner claims that, on May 29, 2007, a bench warrant was issued for her arrest by the Snyder County Court of Common Pleas at the request of the District Attorney's Office after she failed to appear as a witness at her ex-husband's criminal trial. On the following day, May 30, 2007, Bittner was arrested pursuant to the bench warrant issued by the court and was allegedly driven for 2.5 hours to the courthouse.

Bittner alleges that she did not immediately receive a hearing on her bench warrant after being taken into custody, but rather was taken directly to the Snyder County District Attorney's Office. According to Bittner's Complaint, she claims she was "interview[ed] . . . by the District Attorney of Snyder County, [and] Plaintiff reminded the District Attorney that his secretary or a staff member of his Office had promised that transportation would be provided to her to testify at the criminal trial of her ex-husband. . . "[2] Unlike Bittner's question posed to this Honorable Court, Bittner never claimed in her Complaint that she was subjected to "verbal abuse,"

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[2] Appendix A, Complaint, ¶34.

"physical intimidation," or received threats to her family during the time she was at the District Attorney's Office.[3]

At 2:02 p.m. on May 30, 2007, the same day as Bittner's arrest and while at the District Attorney's Office, Bittner claims that the District Attorney's Office filed a Petition to Withdraw the Bench Warrant related to Bittner. Immediately thereafter, Bittner claims that the District Attorney petitioned to withdraw the bench warrant on the basis that Bittner assured him that she would appear for trial in the future.[4] Bittner claims that eight minutes later the Court of Common Pleas vacated the bench warrant issued for her arrest. Bittner allegedly did not attend any hearing or appear before the judge who issued the bench warrant. Bittner claims that Snyder County, acting through its District Attorney, failed to afford her due process since instead of affording her a judicial hearing after her arrest on the bench warrant, the District Attorney simply filed a motion to vacate the bench warrant.

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[3] *See* Appendix A.

[4] Appendix A, Complaint, ¶35.

REASONS IN SUPPORT OF DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

This Honorable Court should deny Bittner's Petition for a Writ of Certiorari because Bittner has failed to present compelling reasons for this Court to exercise its extraordinary and discretionary jurisdiction. Although not exhaustive, Supreme Court Rule 10 sets forth guidelines for the certiorari process and when same will be granted. Rule 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; had decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of

> another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 10.

I. Bittner Has Failed To Cite To Any Compelling Reason For This Court To Grant Certiorari

In this case, the Third Circuit Court of Appeals concluded that Bittner was not deprived of her constitutional rights because she "was present in the courthouse pursuant to a bench warrant" and "the arrest warrant was vacated before a hearing could be conducted."[5] In filing her Petition, Bittner has curtailed her otherwise scattershot claims and theories of liability set forth in her Complaint and sought review by this Honorable Court on the narrow issue of whether having her meet with the District

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[5] *See* Opinion of the Third Circuit, pp.5 and 6.

Attorney before having a hearing on the bench warrant before the Court violated Bittner's constitutional rights. This Petition does not seek to clarify a point of law that has escaped review or to provide this Honorable Court with an opportunity to provide clarity on a point of disputed law, but rather to have the facts of her case re-analyzed under settled law.[6] Indeed, contrary to Bittner's claim, none of the cases cited by Bittner suggests that the Third Circuit's determination conflicts with the decisions of this Court or any other court of appeals. Those cases all involve issues concerning the constitutionality of the length of detention and not the issue of whether a decision to file a motion to vacate the bench warrant instead of taking the detainee for a hearing was constitutional.

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[6] Bittner's Petition for a Writ of Certiorari also includes irrelevant, immaterial, and outright outrageous and scandalous material. Specifically, footnote 1 of Bittner's Petition is a misstatement of the decisions below. In addition, Footnote 3 of Bittner's Petition relates to a kickback scandal involving two former judges of the Court of Common Pleas of Luzerne County that has absolutely no relationship with this case. Bittner makes no connection between her case and the Luzerne County scandal involving the two indicted judges. Even raising this scandal, in the instant matter, and, by implication, attempting to associate Respondent Michael Sholley with the same, is outrageous and scandalous. Petitioner's reliance on that material demonstrates the weakness of her arguments.

A. The Point of Law At Issue Needs No Clarification Given The Instant Facts

This Honorable Court in *Baker v. McCollan* explained that after arrest pursuant to an arrest warrant, "we are quite certain that a detention of three days . . . does not and could not amount to" a deprivation of liberty without due process of law. *Baker v. McCollan*, 443 U.S. 137, 144 (1979).

> Obviously, one in respondent's position could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment. For the Constitution likewise guarantees an accused the right to a speedy trial, and invocation of the speedy trial right need not await indictment or other formal charge; arrest pursuant to probable cause is itself sufficient. We may even assume, arguendo, that, depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of "liberty . . . without due process of law."

Id. at 144-45. Since Bittner's detention fell within the amount of time approved in *Baker v. McCollan*, the lower court's decision does not conflict with the decision of this Court.

In the decisions of other courts of appeals cited by Bittner, the length of detention greatly exceeded the amount of time that Bittner was in custody. In *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998), the court held that a fifty-seven (57) day detention without a judicial hearing following arrest pursuant to a body attachment warrant did not comport with due process. In *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985), the court ruled that an eighteen (18) day confinement without a judicial hearing on a bench warrant offended substantive due process. A claim arising out of an alleged due process violation, under these circumstances, is grounded in the prolonged detention of an individual without judicial review, not whether a hearing occurs before a judicial officer regardless of the length of the detention. Since Bittner's detention fell within the amount of time approved in *Baker v. McCollan*, the lower court's decision does not conflict with the decisions of other courts of appeal.

The Third Circuit's decision barring Bittner's due process claim precisely followed this Court's thirty (30) year-old precedent. The Third Circuit, upon review of Bittner's due process claim arising out of the lack of a post-arrest hearing, ruled that "we fail to see a violation of that right inasmuch as the arrest warrant was vacated before a hearing could be conducted."[7] At the moment the warrant was vacated, Bittner's liberty was restored. Bittner admits that

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[7] *See* Opinion of the Third Circuit, p.6.

she was released on the very day of her arrest and, within eight (8) minutes of the District Attorney's request to have the warrant vacated, the court vacated the warrant. Ironically, Bittner appears to claim that she would have preferred to have been detained up to 72 hours pursuant to Pennsylvania Rule of Criminal Procedure 150 and as permitted by this Court's precedent in order to have a judicial hearing, as opposed to having her liberty restored more quickly through the filing by the District Attorney of a motion to vacate the bench warrant.

This Honorable Court's due process jurisprudence provides the necessary guidance to addresses Bittner's due process claim. Bittner's Petition for a Writ of Certiorari neither raises a novel legal issue nor raises an issue that has at its foundation an important federal question that has gone unaddressed or that has created a conflict among the courts. Simply put, Bittner seeks yet another review of the facts of her case under well-established precedent. Therefore, this Honorable Court should deny Bittner's Petition for a Writ of Certiorari because no compelling reason exists for exercising its powers.

B. Even If Certiorari Is Granted And The Third Circuit Decision Reversed, Bittner's Claims Will Likely Be Dismissed Based On Eleventh Amendment Immunity

Bittner's due process claim, even if reviewed by this Honorable Court and a finding in Bittner's favor

were rendered, would not provide Bittner with any relief on remand.

Bittner claims that Snyder County, acting through its District Attorney's Office, violated her rights because the Snyder County District Attorney's Office allegedly has a policy, custom, or practice "to not provide a post-arrest hearing" with regard to bench warrants, but rather, follows a policy, custom, or practice, "to vacate a bench warrant instead of providing a post-arrest hearing."[8]

When acting in their official capacity and while undertaking their "basic function – enforcement of the Commonwealth's penal statutes," district attorneys are representatives of the Commonwealth, not the county. *Williams v. Fedor*, 69 F. Supp. 2d 649, 660 (M.D. Pa. 1999) *aff.* 211 F.3d 1263 (3d Cir. 2000). District attorneys have a dual or hybrid role. "When 'enforcing their sworn duties to enforce the law . . . they act as agents of the State [but] when county prosecutors are called upon to perform administrative tasks unrelated to their strict prosecutorial functions . . . the county prosecutor in effect acts on behalf of the county that is the situs of his or her office.'" *Carter v. City of Philadelphia*, 181 F.3d 339, 353 (3d Cir. 1999). Therefore, district attorneys when acting in their official role as prosecutors for the state are entitled to Eleventh Amendment immunity. *Williams*

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[8] Appendix A, Complaint, ¶¶58-59.

v. Fedor, 69 F. Supp. 2d 649, 659-663 (M.D. Pa. 1999) *aff.* 211 F.3d 1263 (3d Cir. 2000).

In *Roberson v. County of Essex*, a case relied upon by Bittner,[9] the plaintiff was detained on a bench warrant for two (2) months without a judicial hearing. *Roberson v. County of Essex*, 2006 WL 2844425, *1 (D.N.J. Oct. 2, 2006). The plaintiff brought suit against the district attorney's office, among others, claiming that it failed to ensure plaintiff's appearance before a judicial officer. *Id.* at *3. The plaintiff's claim was dismissed as against the district attorney's office pursuant to the Eleventh Amendment. *Id.* The court explained, assuming *arguendo*, that the prosecutor's office had an obligation to ensure a judicial hearing, that bringing a detainee before a judicial officer is "undoubtedly 'criminal business.'" *Id.*

In the instant case, Snyder County, the municipality, did not take any action relevant to Bittner's allegations, and Snyder County, acting through its District Attorney's Office, is entitled to immunity from Plaintiff's claims pursuant to the 11th Amendment.[10] Bittner claims that Snyder County's District Attorney's Office had a policy of not providing post-arrest hearings on bench warrant arrests for failing

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[9] Petition for Writ of Certiorari, p.14.

[10] *Chisolm v. McManion*, 275 F.3d 315, 322-23 (3d Cir. 2001); *Carter v. City of Philadelphia*, 181 F.3d 339, 353 (3d Cir. 1999).

to appear when subpoenaed, and she alleges that Snyder County, through its District Attorney's Office, followed a policy of vacating the warrants instead of providing a hearing. The actions complained of by Bittner arise in the basic and fundamental role of a prosecutor in compelling the attendance of witnesses at criminal trials and the disposition of bench warrants for those who fail to appear. Few things are more fundamental to the prosecutorial function of a district attorney than compelling the attendance of a witness at a criminal trial to establish the state's case against the accused. *Schneyder v. Smith*, 2007 U.S. Dist. LEXIS 1895 (E.D. Pa. 2007). Bittner does not complain about an administrative act, but rather an act rooted in the Snyder County District Attorney's Office's role as advocate for the state in prosecuting criminal cases. Therefore, on remand, even if Bittner would receive all the relief she requests from this Honorable Court, she would likely face dismissal of her action based on the Eleventh Amendment. For this reason, this Honorable Court should also deny the Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Respondents Snyder County, Pennsylvania and Michael Sholley, District Attorney of Snyder County, respectfully request that this Honorable Court deny Bittner's Petition for a Writ of Certiorari.

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

MARCI J. BITTNER,	:	No.
Plaintiff	:	
v.	:	Civil Action – Law
SNYDER COUNTY, PENNSYLVANIA, and MICHAEL SHOLLEY, DISTRICT ATTORNEY OF SNYDER COUNTY, PENNSYLVANIA,	:	
Defendants	:	Jury Trial Demanded

COMPLAINT (CIVIL ACTION)

NATURE OF ACTION

1.

This is an action for judgment against Defendants Snyder County, Pennsylvania, and Michael Sholley, District Attorney of Synder County, Pennsylvania for damages and attorney's fees under the provisions of 42 U.S.C. §§ 1983 and 1988, for violations of Plaintiff's civil rights under the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution and rights under Commonwealth of Pennsylvania statutes and common law.

JURISDICTION

2.

This Court has subject matter jurisdiction over Plaintiff's claims arising under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution, and the provisions of 42 U.S.C.A. § 1983 by virtue of 28 U.S.C.A. §§ 1331 and 1367.

VENUE

3.

Venue lies in the Middle District of Pennsylvania and is authorized by 28 U.S.C.A. § 1391 because the Plaintiff resides in the District, and Defendants are a local government and a representative of a local government with offices located in the District, and the Plaintiff's constitutional and statutory rights were violated in the Middle District.

PARTIES

4.

Plaintiff, Marci J. Bittner, is a citizen of the United States and an adult individual residing at 7570 Hillside Drive, Spring Grove, Pennsylvania 17362.

5.

Defendant Snyder County, is a local government entity of the Commonwealth of Pennsylvania, acting

by and through the Snyder County District Attorney who under color of state law has policy, custom and procedure-making authority for Snyder County in the administration of the District Attorney's Office, with a business address of Snyder County Courthouse, 9 West Market Street, P.O. Box 217, Middleburg, Pennsylvania 17842.

6.

Defendant Michael Sholley, is the District Attorney of Snyder County and is being sued in his representative capacity, with a business address of Snyder County Courthouse, 9 West Market Street, P.O. Box 217, Middleburg, Pennsylvania 17842.

FACTS

7.

Plaintiff is the custodial mother of a son, now 18 years of age, and is divorced from Jeff Staley, his non-custodial father.

8.

Plaintiff remarried and is the mother of two additional children, aged 6 and 7 at the time of the incident, now ages 7 and 8.

9.

On March 9, 2006, a criminal complaint was filed by the District Attorney of Snyder County against Plaintiff's ex-husband alleging that he was guilty of crimes committed upon the person of Plaintiff's 18 year old son.

10.

On or about June, 2006, Plaintiff was contacted by the Office of the District Attorney of Snyder County and notified that her testimony would be needed at the trial of her ex-husband.

11.

On or about June, 2006, Plaintiff informed the District Attorney's Office that she needed transportation to Snyder County because she did not have a license and could not drive due to a medical condition.

12.

The criminal trial of Plaintiff's ex-husband was scheduled for May 29, 30, 31, and June 1, 2007 in the Snyder County Courthouse, Middleburg, Pennsylvania.

13.

The District Attorney of Snyder County requested a Subpoena to Attend and Testify for

Plaintiff, which was issued by the Snyder County Prothonotary/Clerk of Court on April 24, 2007.

14.

The Subpoena to Attend and Testify on May 29, 30, and 31 and June 1, 2007 was hand-delivered by Patrolman Chad Thomas of the Middleburg Borough Police Department, an agent of the District Attorney of Snyder County and acting pursuant to the policies of Snyder County, and Plaintiff signed for it on May 21, 2007 at her residence in Spring Grove, Pennsylvania. A copy of the Subpoena is attached as Exhibit A and incorporated by reference herein.

15.

At this time, Plaintiff advised Patrolman Thomas, an agent of the District Attorney of Snyder County, that she could not drive, had two children and needed both transportation to the courthouse and custodial care for her children.

16.

The Plaintiff did not receive witness compensation and travel fees from Snyder County, which was located 87.3 miles from her home.

17.

On or about Monday, May 21, 2007, Plaintiff again called the Office of the District Attorney of Snyder County to remind them that she needed transportation from Spring Grove to the Snyder County Courthouse in Middleburg, Pennsylvania, a distance of approximately 175 miles round trip.

18.

On or about Monday, May 21, 2007, a staff member of the Office of District Attorney of Snyder County told Plaintiff that the message that Plaintiff did not drive and needed transportation from Spring Grove to Middleburg had been given to the District Attorney.

19.

On or about Monday, May 21, 2007, a staff member of the Office of District Attorney of Snyder County told Plaintiff that transportation would be provided for her from Spring Grove to Middleburg.

20.

On or about Monday, May 21, 2007, Plaintiff told a staff member of the Office of District Attorney of Snyder County that Plaintiff's 6 and 7 year old children needed to be supervised and placed on the school bus during the trial.

21.

On or about Monday, May 21, 2007, a staff member of the Office of District Attorney of Snyder County told the Plaintiff that someone would be provided to take care of her children and put them on the school bus.

22.

On or about Monday, May 21, 2007, a staff member of the Office of District Attorney of Snyder County told Plaintiff that the District Attorney would return a call on Wednesday, May 23, or Friday, May 25, 2007.

23.

Neither the District Attorney of Snyder County nor a staff member of his Office returned a call to Plaintiff.

24.

On or about May 29, 2007, the District Attorney of Snyder County, or someone acting on his behalf, made application to the 17th Judicial District Court of Common Pleas for a bench warrant to arrest the Plaintiff, for failure to appear as a witness for her ex-husband's criminal trial on May 29, 2007, without advising the court of the agreed conditions to the subpoena.

25.

On May 29, 2007, a bench warrant was issued by the Court for the "immediate production" of Plaintiff.

26.

The bench warrant was given to the police without appropriate training on proper methods of arrest and transport of non-criminal arrestees, and acting pursuant to Snyder County policy and custom established by the District Attorney, Plaintiff was unlawfully arrested on the bench warrant at her home in Spring Grove, Pennsylvania on May 30, 2007 by Chad Thomas, Patrolman of the Middleburg Borough Police Department, as an agent of Snyder County and at the direction of the District Attorney of Snyder County.

27.

Plaintiff, in sight of her neighbors, was handcuffed while in her driveway, and placed in the back seat of a police car by Patrolman Thomas.

28.

Even though Plaintiff was compliant and posed no threat, Patrolman Thomas told Plaintiff she was handcuffed because "procedures" required that she be handcuffed.

29.

Plaintiff was transported from Spring Grove to the Snyder County Courthouse in Middleburg, a distance of approximately 87 miles, handcuffed, in a police car with a glass partition between the front and back seat that did not permit the air conditioned cooled air to reach the back seat, by police who were agents of the District Attorney and Snyder County.

30.

The rear windows of the police car were closed, eliminating air circulation to and in the back seat where Plaintiff was placed.

31.

The maximum temperature on May 30, 2007 in York, Pennsylvania, based on National Weather Service Daily Summary Data, was 87 degrees Fahrenheit with a maximum humidity of 97%.

32.

After an approximately two and a half (2.5) hour trip, based on instructions given to Patrolman Thomas, Plaintiff was not taken for an immediate hearing on her arrest but rather was taken directly to the Snyder County District Attorney's Office.

33.

The handcuffs were removed from Plaintiff only when the Plaintiff arrived at the Snyder County Courthouse.

34.

In the interview of Plaintiff by the District Attorney of Snyder County, Plaintiff reminded the District Attorney that his secretary or a staff member of his Office had promised that transportation would be provided to her to testify at the criminal trial of her ex-husband on May 29, 30, 31, and June 1, 2007.

35.

At 2:02 p.m on May 30, 2007, the Prothonotary/ Clerk of Courts of Snyder County received a Petition to Withdraw Bench Warrant for Plaintiff from the District Attorney of Snyder County.

36.

While the Petition stated that contact had been made with Plaintiff, that Plaintiff had assured that she would appear in the future, and requested that the bench warrant be vacated, it contained no explanation of the facts surrounding the arrest or why Plaintiff had not complied with the subpoena.

37.

Plaintiff was informed by the District Attorney of Snyder County that to solve Plaintiff's transportation needs, Plaintiff's "husband would be subpoenaed in the future", even though he had no relevant testimonial information.

38.

Based on the Petition filed by the District Attorney of Snyder County, the Court signed an Order vacating the bench warrant for Plaintiff, effective at 2:10 p.m., May 30, 2007.

39.

Plaintiff did not attend any hearing or appear before the Judge issuing the bench warrant after her arrest.

40.

At approximately 3:00 p.m., May 30, 2007, while in the District Attorney's Office, Plaintiff was informed that she was not being returned to her home in Spring Grove, Pennsylvania, but that she was going to be "dropped-off" at the house of one of her relatives in Newport, Pennsylvania, approximately twenty (20) miles away from the Snyder County Courthouse.

41.

Plaintiff was taken to the house in Newport, Pennsylvania where she was released from custody.

42.

Newport, Pennsylvania is located approximately 67 miles from Plaintiff's home in Spring Grove, Pennsylvania.

43.

Plaintiff's husband was required to travel to Newport, Pennsylvania to pick-up Plaintiff.

44.

Plaintiff was not subsequently subpoenaed by the District Attorney of Snyder County to testify at the criminal trial of her ex-husband, who was convicted without the need for Plaintiff's testimony and sentenced to state prison for eighteen months to ten years on July 17, 2007.

45.

The District Attorney of Snyder County, Pennsylvania is a Snyder County officer elected by the qualified electors of the County.

46.

The District Attorney is the official Snyder County, Pennsylvania policymaker for the administration of the Snyder County Office of District Attorney.

COUNT I – Violation of 42 U.S.C. § 1983

Marci J. Bittner

v.

Snyder County, Pennsylvania

47.

Plaintiff incorporates Paragraphs 1 through 46 herein as though fully set forth at length.

48.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.] 42 U.S.C.A. § 1983

49.

Defendant Snyder County, acting through the Snyder County District Attorney, failed to meet its U.S. Constitutional duties when it deprived Plaintiff of her rights, privileges and immunities secured by the Fourth, Fifth and Fourteenth Amendments, by obtaining under 42 Pa.C.S.A. § 5904 a bench warrant without a hearing, and arresting and handcuffing Plaintiff when she was not in contempt of the subpoena, and the District Attorney knew or should have known she was not in contempt and her non-appearance was involuntary and because of a failure of the District Attorney to comply with agreed conditions of the subpoena.

50.

Defendant Snyder County, acting through the Snyder County District Attorney, failed to meet its statutory duty under 42 Pa. C.S.A. § 5903 to provide Plaintiff with witness compensation, travel mileage, with lodging and assistance.

51.

Defendant Snyder County, acting through the Snyder County District Attorney, failed to meet its special duty arising from the promises to provide Plaintiff with transportation to Snyder County and to provide child care.

52.

Defendant Snyder County, acting through the Snyder County District Attorney, failed to meet its U.S. Constitutional duty to establish that there was probable cause for a bench warrant to arrest Plaintiff because she had not appeared at trial, when transportation and child care had not been provided as promised.

53.

Defendant Snyder County, acting through the Snyder County District Attorney, failed to meet its U.S. Constitutional and Commonwealth of Pennsylvania common law duties to insure that the Plaintiff was not subjected to misconduct subsequent to her arrest, by the deliberate use of excessive physical force in being handcuffed in sweltering conditions for the duration of the two and a half (2.5) hour trip from Spring Grove, Pennsylvania to Middleburg, Pennsylvania.

54.

Defendant Snyder County, acting through the Snyder County District Attorney, failed to meet its U.S. Constitutional duty to provide due process to Plaintiff under the provisions of Pa.R.Crim.P. Rule 150, 42 Pa.C.S.A.

55.

Defendant Snyder County, acting through the Snyder County District Attorney, had established and followed a policy, custom or procedure to not provide witnesses subpoenaed to testify at trial with transportation, witness compensation, travel mileage, with lodging and assistance with the subpoena, and a policy, custom or procedure indifferent to the need to provide the same, which violated Plaintiff's Fourth, Fifth and Fourteenth Amendment rights under the U.S. Constitution, and Pennsylvania statutory rights.

56.

Defendant Snyder County, acting through the Snyder County District Attorney, established and followed a policy, custom or procedure to not require that probable cause of intentional non-compliance to a subpoena be established before a bench warrant for arrest is requested, and established and followed a policy, custom or procedure indifferent to the need to provide the same, which violated Plaintiff's Fourth, Fifth and Fourteenth Amendment rights under the U.S. Constitution, and Pennsylvania statutory rights.

57.

Defendant Snyder County, acting through the Snyder County District Attorney, established and followed a policy, custom or procedure to not require that a written motion with certification be presented to the court for a bench warrant, and established and

followed a policy, custom or procedure indifferent to the need to provide the same, which violated Plaintiff's Fourth, Fifth and Fourteenth Amendment rights under the U.S. Constitution, and Rules of Criminal Procedure of Snyder and Union Counties..

58.

Defendant Snyder County, acting through the Snyder County District Attorney, established and followed a policy, custom or procedure to not provide a post-arrest hearing, and established and followed a policy, custom or procedure indifferent to the need to provide the same, which violated Plaintiff's Fourth and Fourteenth Amendment rights under the U.S. Constitution and Pennsylvania statutory rights

59.

Defendant Snyder County, acting through the Snyder County District Attorney, established and followed a policy, custom or procedure to vacate a bench warrant instead of providing a post-arrest hearing, and established and followed a policy, custom or procedure indifferent to the need to provide the same, which violated Plaintiff's Fourth and Fourteenth Amendment rights under the U.S. Constitution and Pennsylvania statutory rights.

60.

Defendant Snyder County, acting through the Snyder County District Attorney, established and followed a policy, custom or procedure to not return persons who were arrested to the place of arrest, and established and followed a policy, custom or procedure indifferent to the need to provide the same, which violated Plaintiff's Fourth and Fourteenth Amendment rights under the U.S. Constitution.

61.

Defendant Snyder County, acting through the Snyder County District Attorney, established and followed a policy, custom or procedure to not adequately train or supervise employees who had the responsibility to provide witnesses subpoenaed to testify at trial with transportation, witness compensation, travel mileage, with lodging and assistance, and established and followed a policy, custom or procedure indifferent to the need to provide the same, which violated Plaintiff's Fourth, Fifth and Fourteenth Amendment rights under the U.S. Constitution and Pennsylvania statutes.

62.

Defendant Snyder County, acting through the Snyder County District Attorney, established and followed a policy, custom or procedure to not adequately train or supervise employees who had the responsibility to insure that probable cause be

established before a bench warrant for arrest is requested, and established and followed a policy, custom or procedure indifferent to the need to provide the same, which violated Plaintiff's Fourth, Fifth and Fourteenth Amendment rights under the U.S. Constitution.

63.

Defendant Snyder County, acting through the Snyder County District Attorney, established and followed a policy, custom or procedure to not adequately train or supervise employees who had the responsibility to insure that a post-arrest hearing was provided, and established and followed a policy, custom or procedure indifferent to the need to provide the same, which violated Plaintiff's Fourth, Fifth and Fourteenth Amendment rights under the U.S. Constitution.

64.

Defendant Snyder County, acting through the Snyder County District Attorney, established and followed a policy, custom or procedure to not adequately train or supervise employees who had the responsibility to insure that persons who were arrested were returned to the place of arrest, and established and followed a policy, custom or procedure indifferent to the need to provide the same, which violated Plaintiff's Fourth, Fifth and Fourteenth Amendment rights under the U.S. Constitution.

65.

Defendant Snyder County, acting through the Snyder County District Attorney, established and followed a policy, custom or procedure to not adequately train or supervise persons who had the responsibility to make bench warrant arrests about misconduct subsequent to arrest, including the deliberate use of excessive physical force in being handcuffed in sweltering conditions, and established and followed a policy, custom or procedure indifferent to provide the same, which violated Plaintiff's Fourth, Fifth and Fourteenth Amendment rights under the U.S. Constitution and Commonwealth of Pennsylvania common law.

66.

As a direct result of Defendant Snyder County's egregiously unacceptable, outrageous, or conscience shocking wrongful conduct, acting through the Snyder County District Attorney, of promising but not providing Plaintiff with transportation and child care, requesting and obtaining a bench warrant for her arrest for not appearing as a witness without probable cause, releasing her from custody without a hearing and abandoning her approximately 67 miles away from her home, deprived of her Fourth, Fifth and Fourteenth Amendment rights under the U.S. Constitution, causing injuries.

67.

As a direct result of Defendant Snyder County's egregiously unacceptable, outrageous, or conscience shocking wrongful conduct, acting through the Snyder County District Attorney, Plaintiff was arrested and detained, handcuffed, in sight of her neighbors, and taken to Snyder County, deprived of her Fourth, Fifth and Fourteenth Amendment rights under the U.S. Constitution, causing injuries.

68.

As a direct result of Defendant Snyder County's egregiously unacceptable, outrageous, or conscience shocking wrongful conduct, acting through the Snyder County District Attorney, Plaintiff was subjected to misconduct subsequent to her arrest, by the deliberate use of excessive physical force in being handcuffed in sweltering conditions for the duration of the two and a half (2.5) hour trip from Spring Grove, Pennsylvania to Middleburg, Pennsylvania in violation of her Fourth, Fifth and Fourteenth Amendment rights under the U.S. Constitution and Commonwealth of Pennsylvania common law, causing injuries.

69.

As a direct result of Defendant Snyder County's egregiously unacceptable, outrageous, or conscience shocking wrongful conduct, acting through the Snyder County District Attorney, Plaintiff was

subjected to an invasion of privacy in violation of her rights under the U.S. Constitution, causing injuries.

70.

As a direct result of Defendant Snyder County's egregiously unacceptable, outrageous, or conscience shocking wrongful conduct, acting through the Snyder County District Attorney, Plaintiff was stigmatized, her freedom of association was interfered with, and she experienced pain and suffering, mental and emotional distress, anxiety, embarrassment, nervousness, humiliation, and injury to reputation and dignity, causing injuries.

71.

Defendant Snyder County is liable to Plaintiff Marci J. Bittner for her injuries because it knew or should have known, acting through the Snyder County District Attorney, its chief law enforcement officer and County policy maker, that its conduct and its policies, customs or procedures were unconstitutional, and/or was indifferent to the need to provide constitutional policies, customs or procedures, as detailed in this Complaint, resulting in violations of the Plaintiff's rights under the U.S. Constitution and Commonwealth of Pennsylvania statutes and common law.

WHEREFORE, Plaintiff now respectfully demands a judgment against Defendant Snyder County

for monetary relief for damages, interest and costs, and attorney's fees in an amount in excess of any jurisdictional amount requiring compulsory arbitration.

Respectfully submitted,

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